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80-1476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO._____

TANKLINING CORPORATION,
Petitioner,

v.

GALVESTON SHIPBUILDING CO.,
BREWER KMI, INC., AND
C. BREWER & CO., LTD.,
Respondents

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:

ROBERT C. FLOYD
BUTLER, BINION, RICE,
COOK & KNAPP
1100 Esperson Building
Houston, Texas 77002
(713) 237-3273

Attorneys for Petitioner

Date:

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

QUESTIONS PRESENTED

1. Whether under Texas law special damages in the nature of a bonus may be recovered as part of cost of completion damages for breach of contract without any evidence that the payment was necessary and reasonable.

2. Whether an award for the cost of materials assumed to have been used in completing a breached contract may be recovered by the non-breaching party without any proof that such an expenditure was actually made.

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GALVESTON SHIPBUILDING CO.,
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Respondents

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Tanklining Corporation, respectfully prays that a Writ of Certiorari issue to review the May 21, 1979, judgment and per curiam opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 31, 1980.

OPINION BELOW

The Court of Civil Appeals, Fifth Circuit, affirmed the Findings of Fact, Conclusions of Law and Memorandum Opinion of the United States District Court relat-

ing to damages by per curiam opinion without a written opinion.

JURISDICTION

The per curiam judgment of the Court of Appeals for the Fifth Circuit was entered on October 31, 1980. A timely Petition for Rehearing was denied on November 28, 1980, and this Petition for a Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In March of 1976 Galveston Shipbuilding was formed to acquire the assets of Kelso Shipbuilding, which at that time was a division of Kelso Marine Incorporated, now Brewer KMI, Inc. After acquisition of these assets, Galveston Shipbuilding became an agent for Kelso to complete three existing contracts for the construction of barges. One of these contracts involved the completion of a barge known as Hull 117, which was owned by Hvid Shipping and under charter to Diamond Shamrock Corporation. Part of the construction of Hull 117 required the coating of five separate storage compartments with a special material known as Ameron-75, a lining material designed to protect the tank from the chemical corrosives which would constitute the cargo of the barge. Accordingly, in the Spring of 1976, Galveston Shipbuilding solicited bids for coating of the barge's storage compartments with Ameron-75. After discussions with representatives of Hvid Shipping and Diamond Shamrock, the choice of potential contractors was narrowed to two companies; Petitioner and Maritime Coatings, Inc. The contract was awarded to Petitioner, based on its superior

reputation in the application of Ameron-75 coatings. Petitioner was thought to have applied approximately 90 percent of the Ameron-75 that was manufactured.

After negotiations on the contract for furnishing and applying the Ameron-75, the parties arrived at a contract price of $333,100 for furnishing the labor and materials. A written purchase order dated August 11, 1976, was received by Petitioner on August 16, 1976. This purchase order provided that the work should be completed by October 9, 1976, because another barge was to be placed in position for the same type of application. The purchase order indicated that the barge would be available from August 16 through October 9, 1976.

Petitioner began moving on to the construction site on August 16, 1976, and blasting work began on August 30, 1976, at which time there were six work weeks left to fulfill the contract. For reasons no longer relevant, around September 9, Galveston Shipbuilding suddenly became concerned about completing the job within the scheduled time. On that day, Galveston Shipbuilding terminated the Petitioner's contract and agreed to make Petitioner whole. By mutual agreement, Petitioner's personnel continued to assist in the coating operation through September 14, 1979, and left $15,338.40 worth of coating materials on the job site.

On or about the date of termination of Petitioner's Contract, Galveston Shipbuilding had negotiated a new contract with Maritime Coatings, Inc. to complete the job for $319,000, excluding the costs of additional coating materials. This contract specifically expressed that time was of the essence. The order allowed Maritime Coating six weeks to perform the job at a contract price

of $275,000. In addition, Galveston Shipbuilding agreed to pay a bonus of $44,000 if Maritime Coatings could complete the job by October 8, 1976. Maritime Coatings did not complete the job by October 8, 1976. The evidence indicates that the job was not completed earlier than October 17, 1976.

Although Maritime Coatings failed to complete the job by October 8, 1976, Galveston Shipbuilding nevertheless paid the bonus to Maritime Coatings, Inc. Galveston Shipbuilding's Manager and President differed as to whether the $44,000 was a bonus or payment for other work performed by Maritime Coatings.

In October of 1976, based on Respondent's promise to make Petitioner whole, Petitioner sent Galveston Shipbuilding an invoice for $188,039.61 reflecting Petitioner's cost incurred on the coating project. Galveston Shipbuilding never replied to this invoice.

Petitioner filed its Original Complaint in the United States District Court for the Southern District of Texas against Respondents, Galveston Shipbuilding Co., Brewer KMI, Inc., and C. Brewer & Co., Ltd., alleging diversity jurisdiction under 28 U.S.C. § 1332. Subsequent to the filing of Petitioner's Complaint, Respondent Brewer KMI, Inc., filed an Original Complaint in the United States District Court for the Southern District of Texas alleging that Petitioner had breached the same contract by failing to make progress with its work. That suit sought $89,-979.03 plus attorneys' fees, which amount consisted of the cost of completion of the coating contract, plus payment for certain services allegedly supplied by Galveston Shipbuilding over and above the services required to be furnished under the contract with Petitioner. These

cases were consolidated by order of the Court on April 4, 1978, under the style "Tanklining Corp. v. Galveston Shipbuilding Co., Brewer KMI, Inc. and C. Brewer & Co., Ltd." The case was tried by Honorable Finis E. Cowan, District Judge, without the benefit of a jury. The Court found that Petitioner had breached its contractual obligations by failure to substantially perform under the contract whereby Galveston Shipbuilding was legally justified in terminating the contract midway before the contracted date for completion.

The Trial Court entered judgment against Petitioner on the following basis:

Petitioner's contract price	$ 333,100.00
Less Respondent's advanced payment	32,950.00
Credit for materials left by Petitioner	15,338.40
Less Respondent's contract price with Maritime Coatings, *including bonus*	319,000.00
Less Respondent's contract price of additional materials	$ 41,555.00
RESPONDENT'S JUDGMENT	$ 45,056.60

Only two items in the Trial Court's calculations for awarding damages are now relevant:

1. The Trial Court found Respondent's measure of damages to be completion cost less the Petitioner's contract price of $333,100. The Trial Court found that the Respondent expended $319,000 for labor and services (not including additional coating ma-

terials), which included a $44,000 bonus to be paid for a timely performance which was never rendered, or for additional work which was not part of the contract Petitioner breached.

2. In addition, as part of the award as cost of completion, the Trial Court assumed that Respondent actually expended $41,555 as the cost of additional coating materials necessary to complete the job. There was absolutely no evidence that Respondent actually purchased or expended any sum for these materials. Respondent admitted that the $41,555 was the probable cost of additional coating materials and based this estimate on Petitioner's initial contract negotiation figures.

The Memorandum Opinion of the District Court was affirmed per curiam without opinion by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari for the reason that the Court of Appeals for the Fifth Circuit has affirmed an important legal decision which is in conflict with the applicable law of Texas. There are two well-established rules of Texas contract law which were refused to be applied by the Trial Court and the Court of Appeals.

First, Texas law limits the measure of damages for failure to perform the agreed work under a contract to the difference between the contract price and the amount actually expended for the reasonable and necessary cost of completion. *Hillyard v. Crabtree,* 11 Tex. 264 (Tex.

Sup. Ct. 1854); *Gonzales College v. McHugh,* 21 Tex. 257 (Tex. Sup. Ct. 1858); *McKnight v. Renfro,* 371 S.W.2d 740 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.); *Freeman v. Shannon Const., Inc.,* 560 S.W.2d 732 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.). There is a duty upon the non-breaching party to exercise reasonable care to mitigate these damages. *Polis v. Alford,* 273 S.W.2d 79 (Tex. Civ. App.—San Antonio 1954, writ ref'd); *Reavis v. Taylor,* 162 S.W.2d 1030 (Tex. Civ. App.—Eastland 1942, writ ref'd); *Walker v. Salt Flat Water Co.,* 128 Tex. 140, 96 S.W.2d 231 (1936). Texas does not permit recovery of special damages incident to completion of the contract unless it was contemplated by the parties. *Murchison v. Caruth Building Service,* 369 S.W.2d 380 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.).

In this case, when Galveston Shipbuilding terminated Petitioner's contract for breach of contract, it entered into another contract for completion of the work with Maritime Coatings, Inc. The contract stated that Galveston Shipbuilding would pay Maritime Coatings "$319,000.00 if job is completed within the specified four (4) week period ending October 8, 1976"; otherwise, "$275,000 if job requires six (6) weeks (to October 22nd)." It is undisputed that Maritime Coatings did not complete its work under the contract until at least October 17. However, Maritime Coatings was still paid the full $319,000.00, which both Courts below included without distinction in the measure of damages for cost of completion. In essence, Galveston Shipbuilding gratuitously paid a $44,000.00 bonus more than was legally necessary under the terms of the Maritime contract, and was allowed to recover the amount of the bonus against Petitioner.

The decisions below do violence to the long established Texas measure of damages for breach of contract. The bonus was an award of special damages not authorized under Texas law.

Second, the Trial Court refused to follow Texas law which required Petitioner to prove how much money was actually expended to complete the contract, and whether the amount was reasonable and necessary. *Nelson v. San Antonio Traction Co.,* 107 Tex. 180, 175 S.W. 434 (1915). This rule is not an idiosyncrasy of Texas law, but a fundamental principle of all contract law. *Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.,* 152 U.S. 200 (1893). The Trial Court awarded Respondents $41,555.00 for the cost of purchasing additional coating materials for the completion of the contract which Petitioner was found to have abandoned. This sum was, without question, derived not from any actual record of expenditure made by Respondents, but from Petitioner's estimate of the necessary cost of materials, which estimate was formed before the contract was even entered into. There was absolutely no proof that a sum of money was actually spent on additional coating materials, that this value of coating materials was actually used, or that even if the expenditure was actually made, it was reasonable and necessary.

Either the Petitioner actually paid for additional coating materials or he did not. This is not the type of proof which is not difficult to present in support of such contention if, in fact, the Respondent actually bought the materials. All the Respondent had to do was testify to this fact or present some evidence of payment for such purchase. However, as admitted by the Respondent, there was no such evidence, and Respondent requested the

Court to assume that the materials were purchased, and further assume that Respondent paid the same amount as indicated in Petitioner's contract, and also assume that the assumed expenditures were reasonable and necessary to complete the job.

The measure of damages for failing to complete a breached contract in Texas is the amount of costs *actually expended* to complete the breached contract. Such proof is unlike a personal injury case for damages, because money actually expended to complete a contract is easily ascertainable, determinable, and mathematically demonstrable. Under Texas law, this measure of damages cannot be supported by assumption, speculation or conjecture.

CONCLUSION

The Trial Court and the Court of Appeals completely failed to follow long-established and important principles of Texas contract law. No valid reason exists for allowing Respondents' recovery for special damages and unsupported expenditures contrary to the principles of Texas law on contracts.

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

Of Counsel:

ROBERT C. FLOYD
BUTLER, BINION, RICE,
COOK & KNAPP
1100 Esperson Building
Houston, Texas 77002
(713) 237-3273

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for a Writ of Certiorari have been mailed by certified mail, return receipt requested, to all counsel of record on this 26th day of February, 1981.

/s/
ROBERT C. FLOYD

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
For The Fifth Circuit

Unit A

No. 79-2484

TANK LINING CORPORATION,
Plaintiff-Counterdefendant-
Appellant-Cross Appellee,

v.

GALVESTON SHIPBUILDING CO.,
BREWER KMI, INC. and C. BREWER & CO., LTD.,
Defendants-Counterplaintiffs-
Appellees-Cross Appellants.

Appeals from the United States District Court
for the Southern District of Texas

(OCTOBER 31, 1980)

Before AINSWORTH, Circuit Judge, KUNZIG, Judge* and RANDALL, Circuit Judge.

PER CURIAM:

Affirmed on the basis of the Findings of Fact, Conclusions of Law and Memorandum Opinion dated April 18, 1979, and the Findings of Fact and Conclusions of Law Relating to Damages dated May 2, 1979, of District Judge Finis E. Cowan.

AFFIRMED.

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* Judge of the United States Court of Claims, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
For The Southern District Of Texas
GALVESTON DIVISION

CIVIL ACTION NO. G-77-164
TANK LINING CORPORATION
Plaintiff

v.

GALVESTON SHIPBUILDING CO.,
BREWER KMI, INC., and
C. BREWER & CO., LTD.
Defendants

(Filed May 2, 1979)

JUDGMENT

The above-entitled action came on regularly for trial before Finis E. Cowan, Judge of the above-entitled Court, sitting without a jury; testimony was introduced and after both parties rested, the Court made its Findings of Fact and Conclusions of Law and rendered its Memorandum Opinion.

Based on said Findings of Fact and Conclusions of Law made and entered in the above-entitled action,

It is ORDERED and ADJUDGED that Defendant and Counterplaintiff, GALVESTON SHIPBUILDING CO., agent for Defendant and Counterplaintiff BREWER KMI, INC., recover Judgment against Plaintiff and Counter-defendant TANK LINING CORPORATION, in the sum of $45,056.60, together with interest thereon at the rate of 6% per annum from January 1, 1977 through the date of Judgment, May 2, 1979, in the amount of

$6,584.29; and further, GALVESTON SHIPBUILDING CO., as agent for BREWER KMI, INC., should recover judgment for interest on the total sums recovered at the rate of 9% per annum from the date of judgment until paid, and recover from TANK LINING CORPORATION its costs and disbursements that occurred herein.

TANK LINING CORPORATION'S claim against the Defendants GALVESTON SHIPBUILDING CO., BREWER KMI, INC., and C. BREWER AND COMPANY, LTD., is dismissed on the merits with prejudice with costs taxed against TANK LINING CORPORATION.

ENTERED and EXECUTED this 2nd day of May, 1979.

/s/ FINIS E. COWAN
Finis E. Cowan
United States District Judge

SUBMITTED BY:

/s/ CHARLES M. JORDAN
Charles M. Jordan
610 U.S. National Bank Bldg.
Galveston, Texas 77550
ATTORNEY IN CHARGE
ATTORNEY FOR DEFENDANT

Of Counsel:
SMITH & HERZ, P.C.
Charles B. Smith

IN THE UNITED STATES DISTRICT COURT
For The Southern District of Texas
Galveston Division

CIVIL ACTION No. G-77-164

TANK LINING CORPORATION
Plaintiff

v.

GALVESTON SHIPBUILDING CO.,
BREWER KMI, INC., and
C. BREWER & CO., LTD.,
Defendants

(Filed April 19, 1979)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

The above-styled case was tried to the court on April 3, 4 and 5, 1979. This instrument contains the court's findings of fact and conclusions of law.

Essential Issue

This case hangs upon one essential fact inquiry: On September 9, 1976, had Tank Lining Corporation (hereinafter "Tank Lining"), the plaintiff and cross-defendant, so substantially breached the contract (Plaintiff's Exh. 4) that defendant Galveston Shipbuilding Co. (hereinafter "Galveston Shipbuilding") was legally justified in terminating Tank Lining's performance. The court, for the reasons stated herein, has concluded that on September 9, 1976, Tank Lining had totally breached its contractural obligations to perform.

Basic Factual Background

This case, in a nutshell, is an illustration of the truism that even a champion can sometimes fumble. Tank Lining, the leader in its field, has never previously failed to perform a contract or been required to leave a construction job.

A basic understanding of the work is necessary. Galveston Shipbuilding, during the spring and summer of 1976, was in the final stages of constructing a very large sea-going barge, "Hull 117." Hull 117 was designed for the transportation of chemicals, and for this purpose had five enormous tanks. The testimony described these tanks as being approximately as large, in length and width, as the courtroom in Galveston, Texas, but twice as deep. The immensity of these tanks is demonstrated by Defendants' Exhs. 13 and 14 consisting of pictures of the inside surfaces of the tanks.

The task was to coat the inside surfaces of these tanks with a substance called "Ameron 75," a substance particularly designed for the purpose of protecting steel tanks from corrosive chemicals. The application of Ameron 75 is a specialized task requiring expert knowledge and skill.

The application of Ameron 75 is described as follows: It is first necessary to sandblast the steel surface in a meticulous manner. The steel surface must be cleansed of virtually every fragment of rust, paint or impurity. This is done by sandblasting which leaves the metal almost as bare and clean as if it had been cleansed by acid. In the corrosive atmosphere of the Texas Gulf Coast during the summer months, it is thought necessary by some to close the hull of the vessel and install gigantic dehumidifying equipment to keep the humidity in the

tanks during and immediately after the blasting very low. Some persons in the industry do not believe this dehumidifying process is necessary, but this dispute is essentially moot here because the owner of the vessel required the dehumidification process, and Tank Lining agreed to perform its work by using the dehumidification equipment.

The period which elapses after the sandblasting and before the application of the primer coat is particularly critical. If, during this interim, the surface is exposed to humid air, the surface will very quickly develop rust and the sandblasting will have been for naught. An inspection process required that before application of the Ameron 75, the inspectors for the owner were required to approve the sandblast job and approve the surface for application of the primer coat.

In the summer of 1976 time had become critical. Galveston Shipbuilding was the successor to an entity known as "Kelso Shipbuilding." Kelso Shipbuilding had originally entered the contract to construct Hull 117 with the Hvide Corporation, a Swedish shipowner. Hvide Corporation, in turn, had contracted with Diamond Shamrock Corporation to charter the vessel to Diamond Shamrock.

In the summer of 1976 construction of the vessel was over a year behind schedule, and in fact, the construction had been well behind schedule when Galveston Shipbuilding assumed the obligation, as Kelso's agent, to complete Hull 117. In addition to the time pressure created by possible liquidated damages, the contract between Hvide and Diamond Shamrock granted to Diamond Shamrock the right to cancel its contract to charter the vessel if the vessel was not ready for use by December of 1976.

It is undisputed that for the vessel to be delivered by December of 1976 it was necessary that it be launched by mid-October of 1976 so that certain work, which could be done only after launching, could be completed.

One critical element in the planning was the completion of the coating of the tanks with Ameron 75. In April of 1976 Galveston Shipbuilding solicited bids from Tank Lining and Maritime Coatings, Inc. for the performance of the tank-coating work.

Tank Lining is the acknowledged leader in the application of Ameron 75. Tank Lining has, without question, installed and applied infinitely more Ameron 75 than anyone else in the industry and has probably purchased, for application, between 75% and 80% of all of the Ameron 75 ever manufactured. On the other hand, Tank Lining at the time of submitting the bids in April and at the time this controversy arose, had never performed a major maritime job. The other potential and actual bidder was Maritime Coatings, Inc., which had considerably more experience than Tank Lining in the application of linings in maritime work, but which had less experience than Tank Lining in the application of Ameron 75.

Eventually, Tank Lining was selected to do the job, primarily because of the views of the potential charterer, Diamond Shamrock, that Tank Lining was the best qualified contractor to apply Ameron 75.

For reasons that are largely unexplained in the record, very little was done concerning the tank lining work from the time when bids were solicited in April of 1976 until July of 1976.

On July 9, 1976, it is the position of Galveston Shipbuilding that Tank Lining was verbally notified that it

had the job and should immediately proceed. There is considerable controversy between the parties as to when, during the month of July, a contract was actually entered, but as this court views the facts, this controversy is largely immaterial.

The most significant event, as the court analyzes the evidence, during the month of July was the "procedure meeting" which occurred on July 25. The most significant testimony concerning the procedure meeting is the testimony of Wallace P. Cathcart, the chief executive of Tank Lining. Significantly, Mr. Cathcart testifies that it is the philosophy of his company that the use of dehumidification equipment is not required in the application of Ameron 75, although he acknowledges that this is a matter of dispute within the industry. Although Mr. Cathcart did not feel that the use of dehumidification equipment was necessary in the vessel in question, he ultimately bowed to the owner's desire to use dehumidification equipment. Tank Lining had no experience with the use of dehumidification equipment and did not actually believe in using dehumidification equipment. Tank Lining did not own dehumidification equipment, but was required to lease it from another concern.

Tank Lining acknowledges that it knew that it had the job by July 30, 1976, and it began to make preparations for the job.

The contractural relationship between the parties is established by Purchase Order No. B-06535 dated August 11, 1976 between Tank Lining and Kelso Shipbuilding, a division of Kelso Marine, Inc., subsidiary of C. Brewer & Co., Ltd. Galveston Shipbuilding Co. functioned as Kelso's agent.

The purchase order contains the following language relating to the schedule:

> Work is to be performed within the eight (8) week period, with every effort made to complete job sooner, as quoted by Tank Linings Corp. Coating is scheduled to begin no later than 16 August to allow completion by 9 October '76. (according to schedule furnished by shipyard 29 June '76.)

While there is some ambiguity concerning this language, it is clear from the evidence that all parties, by July 30, 1976, knew that time was of the essence and knew that serious consequences would occur if the coating work were not completed by October 9, 1976. There is very little ambiguity concerning the language "Coating is scheduled to begin no later than 16 August . . ."

While there is some dispute in the evidence as to whether or not Tank Lining realized the severe consequences of failure to complete the job by October 9, 1976, the court cannot credit the position that Tank Lining was unaware of the urgent time constraints. Tank Lining may not have been aware of all of the details concerning the severe consequences which would occur from tardy performance, but the court is persuaded that Tank Lining, through its responsible officials, knew or certainly should have known that severe consequences would occur if the work were not completed by approximately October 9, 1976 and that a significant aspect of Tank Lining's commitment was to complete the work by October 9, 1976.

Coating did not begin on August 16, 1976. In fact, the records of Tank Lining establish that during the week commencing August 16, 1976, Tank Lining had only

one employee on the job. Blasting did not begin until August 30. As soon as the blasting began, Tank Lining developed serious difficulties which it appeared to be unable to solve. The first difficulty was that the leased dehumidification equipment broke down. The dehumidification equipment was down for two or three days and was ultimately repaired and placed back in operation. Blasting then continued during the week of August 30. During this week, Tank Lining had only 20 employees on the job.

Blasting continued from August 30 until September 9, 1976, when the contract was terminated. Although Tank Lining had thus been attempting to "blast" and prepare the surface, it did not succeed in ten days in preparing one square foot of surface in such a manner as to be suitable for coating. The evidence is undisputed that the owner's inspectors never approved a single square foot of the blasted surface while Tank Lining was on the job.

Part of the difficulty with Tank Lining's position, both during the job and at trial, is that Tank Lining was never able to give any satisfactory explanation as to why it was having so much difficulty with the job. In fact, it apparently appeared in August of 1976, and it appeared to the court at the time of trial, that Tank Lining really never fully understood why it was having so much difficulty on this job and still does not understand why it had so much difficulty.

For example, one of the principal difficulties which Tank Lining had was that water was in some unexplained manner infiltrating the blasting lines. This made it virtually impossible to obtain the rust-free, clean surface re-

quired. This problem was never satisfactorily solved. In fact, on the evening of September 8, the day before the actual cancellation, Tank Lining was still experiencing water in the blasting lines. Although Mr. Cathcart testifies with great force that all of their problems had been solved, this testimony is hard to credit in the light of the undisputed fact that as late as September 8, water was still infiltrating the blast lines, and Tank Lining had not discovered, with certainty, why this difficulty persistently recurred. During the week of August 29, as mentioned above, Tank Lining had 20 men on the job during a portion of the week. Tank Lining had difficulty motivating its workmen to work over the Labor Day weekend, and work ground to a virtual halt over the holiday weekend. During the week of September 5, the week during which the contract was terminated by Galveston Shipbuilding, Tank Lining had 31 employees on the job.

Tank Lining had its own scaffolding, which allowed access to only 25% of the interior surface of the tank, and which was set up in only two tanks at the time, so that only two of the tanks could be worked upon at one time.

By the week of August 30, 1976, the responsible officials for Galveston Shipbuilding had become extremely concerned about Tank Lining's ability to complete the lining by October 9. This concern was expressed daily to Tank Lining's field personnel and its regional manager; and finally on Saturday morning, September 4, 1976, Mr. Cathcart, president of the company, was called at his home by the field personnel of Galveston Shipbuilding to express their extreme concern regarding completion of the job. Mr. Cathcart gave persuasive and confident

assurances that the job would be completed without difficulty, and promised to come to Galveston the following week.

During the following week, the week of September 7, Galveston Shipbuilding personnel became increasingly concerned as Tank Lining's efforts to blast successfully continued to fail.

On the evening of September 8, Tank Lining still had water in its blasting lines and still had not succeeded in blasting successfully a single square foot of surface in such manner that the surface was acceptable.

On September 9, Tank Lining had ordered another piece of equipment, which would assertedly solve the problem. Throughout the entire discouraging ten days of unsuccessful efforts to blast, however, Tank Lining had continually assured Galveston Shipbuilding that it would solve the problem by adding more equipment, but the additional equipment, if it appeared, had not solved the problem.

On September 8, Mr. Cathcart came to Galveston and spent most of September 8 and 9 with the Galveston Shipbuilding personnel. By the end of the day on September 9, the responsible officials of Galveston Shipbuilding had become persuaded that Tank Lining could never do the job, and could not, with certainty, do it within any reasonable time. Therefore, at 6:00 p.m. on the evening of September 9, 1976, Galveston Shipbuilding delivered to Mr. Cathcart a brief note terminating the contract.

Late in the afternoon of September 9, a conversation occurred between Harry F. Feigel, chief executive officer

of Galveston Shipbuilding, and Mr. Cathcart, chief executive of Tank Lining, which Tank Lining asserts constituted an oral contract. This conversation can be understood only in the context of the entire conference.

Despite the fact that Galveston Shipbuilding personnel were extremely concerned about the performance of the contract, personal relations between Tank Lining personnel and Galveston Shipbuilding personnel had remained reasonably amicable. Mr. Feigel and Mr. Cathcart are both gentlemen and behaved as such. During the latter part of the afternoon of September 9, there had been considerable discussion concerning Tank Lining's reputation, and the desire of all parties that Tank Lining's admirable reputation and its valuable relationship with Diamond Shamrock not be imperiled. Feigel attempted to work out an arrangement which would minimize embarrassment and financial loss to Tank Lining by encouraging Tank Lining to work out some joint venture with Maritime Coatings, Inc., which would minimize Tank Lining's financial loss and any professional embarrassment. Mr. Trum of Maritime Coatings and Mr. Cathcart of Tank Lining had discussed a possible joint venture, but were unable to work out a satisfactory arrangement.

Near the end of the meeting, at which time Tank Lining had already been informed of Galveston Shipbuilding's decision to terminate Tank Lining's performance, an oral conversation occurred between Feigel and Cathcart which Tank Lining asserts constitutes an oral contract.

As might be expected, since no verbatim record was kept of the conversation, the parties' recollection of the conversation is not entirely consistent. Both Feigel and

Cathcart, however, testify with complete candor and honesty concerning the conversation.

Mr. Cathcart testifies that Mr. Feigel did state to him, "We will try to keep you whole." or "We will keep you whole." Mr. Cathcart also states that he suggested, somewhat flippantly, to Feigel that this be placed in writing and that Mr. Feigel responded that "No, I do not want to make this a contract."

Mr. Feigel admits saying something to the effect that "We will try to keep you whole." He explains this by stating that in the context of the conversation, what he was really talking about was trying to handle the situation in such a way that the professional embarrassment to Tank Lining would be minimized and Tank Lining's reputation would be harmed to the minimal extent possible.

In any event, both Feigel and Cathcart agree to the following significant points related to this conversation:

1. There was no discussion of the specific amount of money which Galveston Shipbuilding would pay Tank Lining, and in fact no discussion of money at all.
2. There was no specific promise on the part of Galveston Shipbuilding to pay Tank Lining's accrued expenses.
3. There was no discussion concerning reimbursement for those services which Galveston Shipbuilding had provided to Tank Lining, during Tank Lining's attempted performance.
4. There was no specific discussion as to what Tank Lining had expended in its efforts to perform or

what Tank Lining would do if Galveston Shipbuilding did not "keep whole" Tank Lining.

5. There was no discussion concerning the manner in which the parties would compute any financial payments to be made between them.

6. There was no discussion concerning the authority of Mr. Feigel to commit Galveston Shipbuilding's principal, Kelso, to an agreement.

It is also significant that during the conference which occurred on September 8 and 9, there was never any assertion by Tank Lining that it was entitled to an additional ten days to prove that it could perform the contract or that Galveston Shipbuilding was precluded from terminating the contract because of a requirement of ten days notice.

If a finder of fact had before him only the testimony of Mr. Cathcart and the Galveston Shipbuilding personnel, it might be difficult to decide whether or not in fact Tank Lining could have completed the job within the four weeks remaining. Mr. Cathcart is a very persuasive and knowledgeable gentleman who testifies with great force that his company could have completed the contract within four weeks. By the same token, Mr. Feigel and his personnel are persuasive, experienced businessmen who obviously were totally convinced that Tank Lining could not complete the job within four weeks. More eloquent than Mr. Feigel's testimony, is his action. Terminating Tank Lining's performance was a course of action involving some degree of risk and one which Galveston Shipbuilding executives obviously would not have taken unless they were in good faith persuaded that Tank

Lining could not complete performance within the required period of time.

The evidence which makes resolution of the key factual dispute easy, however, is the brief but very cogent testimony of Mike DiSalle, now a coatings consultant but previously an employee of Maritime Coatings, Inc.

Tank Lining had been attempting to perform this task with between 20 and 31 persons on the job during the weeks of August 30 and September 5. A substantial number of these people were inexperienced, casual workers acquired from Manpower. Maritime Coatings, on the contrary, immediately brought in an experienced crew of approximately 115 men. These 115 men commenced working around the clock, on 12-hour shifts, with all of the supervisors working 14 to 16 hours per day.

While Tank Lining had scaffolding in only two of the tanks and the scaffolding in place would allow access to only 25% of the surface area of each tank, Maritime Coatings immediately installed complete scaffolding in all five tanks allowing total access to every square foot of the tanks. This scaffolding is demonstrated by Defendants' Exh. 13.

Defendant's Exh. 12 constitutes a tabulation of the testimony concerning the contrast between the equipment placed on the job by Maritime Coatings and the equipment which had previously been placed on the job by Tank Lining. Maritime Coatings placed on the job much larger dehumidification equipment. This was dehumidification equipment owned and operated by Maritime Coatings and which the Maritime Coatings personnel had experience in operating. Tank Lining had no experience with dehumidification equipment, had been required to

lease dehumidification equipment from another concern, and the dehumidification equipment had delayed the job by poor performance.

Despite the number of employees and the large equipment committed by Maritime Coatings, completion of the task in four weeks was a herculean effort.

The evidence is undisputed that Tank Lining, on September 9, was not able, willing, or prepared to commit to this job the manpower or equipment of the type which obviously was required to complete the work within four weeks. Tank Lining had not faced up to the magnitude of the problem.

Maritime Coatings, for all practical purposes, completed the work within four weeks, and the ship was successfully launched by mid-October.

An analysis of this evidence has persuaded the court that the Galveston Shipbuilding personnel were correct and that it had become overwhelmingly probable, and in fact virtually certain, by September 9, that Tank Lining would not be able to complete this work within four weeks, and in fact, might never complete the work within any reasonable period of time.

Applicable Legal Principles

Tank Lining asserts a cause of action for breach of contract. Galveston Shipbuilding had an obligation to conduct its work and deal with Tank Lining so as to avoid interferring with Tank Lining's performance and to give Tank Lining a reasonable opportunity to perform.

On the other hand, the court is persuaded that if Tank Lining's performance was so substandard that it became

reasonably certain that Tank Lining would not be able to complete performance of the work within the period allotted, Galveston Shipbuilding was legally authorized to terminate Tank Lining's performance.

The Purchase Order itself is to some degree ambiguous. Paragraph 8 of the "Standard Terms and Conditions," in its pertinent parts, provides:

> 8. DEFAULT — (A) Buyer may, by written notice of default to Seller, terminate this order or any part thereof if Seller (1) fails to delivery (sic) the articles, or perform the service, in accordance with delivery schedule specified herein, or any extension thereof, or (2) so fails to make progress as to endanger performance of this order, or fails to comply with any of the other provisions of this order and does not cure such failure within a period of ten (10) days, or such longer period as Buyer may authorize in writing, after receipt of notice from Buyer specifying such failure. (B) In the event of termination pursuant to this clause, Buyer may purchase similar articles elsewhere or secure the manufacture and delivery of the articles by order or otherwise. Seller shall be liable to Buyer for any excess cost to Buyer, provided, however, that Seller shall not be liable for such excess cost when the delay of Seller in making deliveries is due to causes beyond the control and without the fault or negligence of Seller. No cause shall constitute a basis for excusable delay unless Seller has notified Buyer in writing of the existence of such cause within ten (10) days from the beginning thereof. (C) Buyer may, by written notice, terminate this order in whole or in part for default if, in Buyer's opinion, Seller appears to be insolvent or in any unsound financial condition so as to endanger performance.

The ambiguity created by this language is whether or not the Seller is always entitled to ten days written notice of his deficiencies before his performance is terminated. In this case, however, the court is persuaded that this ambiguity is not controlling because the court is persuaded that even if ten days written notice had been given, there is no reasonable expectation that Tank Lining would have or could have performed the contract. In other words, even if there was a requirement of ten days written notice, and even if that requirement was breached, Tank Lining has not demonstrated any damage by virtue of this breach because the court is totally persuaded that even if ten days notice had been given, Tank Lining could not have performed the work within the contract period.

It is significant that during the extensive discussions whch took place on September 8 and 9, neither party referred to the asserted ten days notice requirement, and Tank Lining never asserted, during the negotiations leading to the termination of its performance, that it was entitled to ten days notice.

In addition, it is apparent that the principal purpose of the notice provision was to prevent Kelso from arbitrarily terminating performance without giving the seller an opportunity to resolve its deficiencies. In the present case, Galveston Shipbuilding personnel had been discussing Tank Lining's poor performance constantly from almost the first day that Tank Lining placed any substantial number of persons on the job. Mr. Cathcart never took the position in the discussions of September 8 and 9 that he was entitled to ten days notice, and it could thus be persuasively argued that Tank Lining had waived any

requirement of the ten day notice even if ten days notice were required.

In view of the ambiguity of the contract language as to whether ten days notice was required, the court may also look at the conduct of the parties in construing the meaning of the contract. This conduct persuades the court that neither party, during the course of the negotiations, believed that ten days notice was required.

Specific Findings of Fact and Conclusions of Law

1. On September 9, 1976, Tank Lining had substantially breached its contractural obligations by material failures to perform, and its failure was sufficient to justify Galveston Shipbuilding's termination of Tank Lining's performance.

2. Even if the Purchase Order of August 11, 1976, required ten days notice (and the court is not persuaded that it actually did so) Tank Lining's breach of the obligations of the Purchase Order of August 11, 1976 was so substantial as to relieve Galveston Shipbuilding and Kelso Shipbuilding of the obligation to perform the Purchase Order dated August 11, 1976.

3. Galveston Shipbuilding has established, by a preponderance of the credible evidence, that even if Tank Lining had been given ten days notice on September 9, or at an earlier date, Tank Lining would not have been able to perform the Purchase Order within the contract period or anything approximating the contract period.

4. In connection with the performance of the Purchase Order dated August 11, 1976, time was of the essence and all parties realized, or should have realized, that time was of the essence.

5. On September 9, 1976, Tank Lining had failed to perform the services called for by the Purchase Order dated August 11, 1976, in accordance with the delivery schedule specified in that Purchase Order.

6. On September 9, 1976, Tank Lining had totally failed to make progress, and its failure to make progress was such as to endanger performance of the Purchase Order of August 11, 1976. In fact, the court has concluded that Galveston Shipbuilding has proved by a preponderance of the credible evidence that Tank Lining could not have completed the work called for by the Purchase Order within the contract period or within any reasonable time approximating the contract period.

7. Paragraph 8 of the "Standard Terms and Conditions" of the Purchase Order of August 11, 1976, is ambiguous concerning the requirement of ten days notice, and the parties themselves, by their conduct, did not apparently construe the contract so as to require ten days notice.

Damages

Defendants and cross-plaintiffs have presented testimony concerning the damages resulting from Tank Lining's breach which the court credits. Counsel for defendants is instructed to prepare a proposed set of findings of fact and conclusions of law relating to the damage

aspects of this case and submit them to the court for analysis, modification and approval if proper.

Counsel are also instructed to prepare a form of judgment, agreed to insofar as its form is concerned, consistent with this memorandum opinion, and consistent with the damages testimony presented by defendants.

The proposed findings and a proposed form of judgment will be presented to the court by April 26, 1976.

ENTERED and EXECUTED this the 18th day of April, 1979.

/s/ FINIS E. COWAN
United States District Judge

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NO. 80-1476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TANKLINING CORPORATION,
Petitioner,

v.

GALVESTON SHIPBUILDING CO.,
BREWER KMI, INC., AND
C. BREWER & CO., LTD.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Counsel of Record:

CHARLES M. JORDAN
DIBRELL, DIBRELL, GREER & BROWN
One Moody Plaza, 14th Floor
Galveston, Texas 77550
(713) 765-5525
Attorneys for Respondents

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

LIST OF PARTIES

As per U.S. SUP. CT. R. 22.1, 28.1, and 34.1(b), the following is a list of parties and related companies:

Tanklining Corporation
Tanklining of Texas, Inc.
Interstate Railcar Services, Inc.
(Tanklining Corporation owns majority of voting shares)

Brewer KMI, Inc.
Galveston Shipbuilding Company

C. Brewer & Co., Ltd. (Wholly owned by I.U. International Corporation)
(Parent corporation of Brewer KMI, Inc.)

Subsidiaries:

Brewer Chemical Corporation
Hilo Transportation & Terminal Co., Inc.
National Molasses Company
Hawaiian Agronomics International, S.A.
Kilauea Agronomics, Inc.
Mauna Loa Macadamia Nut Corporation
Empresa Agricola El Pacayal, S.A.
Brewer Solomons Associates
Ka'u Sugar Co., Inc.
Mauna Kea Sugar Co., Inc.
Olokele Sugar, Ltd.
Wailuku Sugar Company
Hawaiian Agronomics Company
Hawaiian Investment Co., Inc.
Hawaiian Insurance Companies

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GALVESTON SHIPBUILDING CO.,
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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

The Respondents, Galveston Shipbuilding Co., Brewer KMI, Inc., and C. Brewer & Co., Ltd., respectfully pray that Petitioner's Petition for a Writ of Certiorari be denied. As per U.S. SUP. CT. R. 22.1 and 34.2, Respondents state their satisfaction with Petitioner's Questions Presented, Opinion Below, and Jurisdiction, but Respondent would like to correct some inaccuracies and omissions in the Petitioner's statement of the case.

STATEMENT OF THE CASE

Respondents disagree with Petitioner's Statement of Facts especially as it relates to those events that took place on and after September 9, 1976. Some of the facts recited do not take into account the District Court's findings and the many conflicts in testimony. Without referring to the undisputed facts or inconsequential inaccuracies, Respondents will make their Statement of the Case. References will read as to Petitioner's Appendix "P.A.-#," and as to Respondents' Appendix "R.A.-#."

The Purchase Order dated August 11, 1976, between Petitioner and Respondent's agent, Galveston Shipbuilding Co., hereinafter Galveston Shipbuilding, provided for a price of $333,110.00. This price included $41,555.00 for coatings, of which only $15,338.40 was actually purchased by Petitioner. (R.A.-4) There was conflict in the testimony as to whether, under the Purchase Order, blasting was to begin on August 30th (as Petitioner claims) or in the middle of August, with coating to begin on August 16th (as Galveston Shipbuilding alleged). The District Court favored the latter. (P.A.-9) Both the barge and the shipyard were available to receive men and equipment in preparation for blasting and coating as early as August 5, 1976.

From almost the very beginning of the job, Galveston Shipbuilding was concerned about Petitioner's ability to complete the job, but Petitioner contended this concern was sudden as of September 9, 1976. The District Court stated that the concern was evident at least by the week of August 30, 1976. (P.A.-11, 19) Time was not only of the essence in the Purchase Order, but also critical. (P.A.-6, 21) Due to Petitioner's substantial breach of its con-

tractual obligations, Galveston Shipbuilding justifiably, the District Court found, terminated the Purchase Order on September 9, 1976. (P.A.-20) It is undisputed that not one square foot of one tank was blasted satisfactorily. (P.A.-12) No attempt to coat took place. Petitioner has always contended that Galveston Shipbuilding promised to make Petitioner whole by paying all of its costs on the job, but Galveston Shipbuilding has always denied this and the District Court's finding supported Galveston Shipbuilding. (P.A.-14)

Maritime Coatings, Inc.'s purchase order stated that it was to be paid $319,000.00 if the job was completed within the four-week period ending October 8, 1976, and was to be paid $275,000.00 if the job required six weeks to October 22nd. Neither price included coatings. Maritime Coatings completed all operations by October 17th and was paid $319,000.00 (R.A.-5) Petitioner argued this payment was wrong, but Galveston Shipbuilding stated that the payment was proper since for all practical purposes the work was completed within four weeks; the District Court agreed with Galveston Shipbuilding. (P.A.-17)

The District Court in his Findings of Fact and Conclusions of Law Relating to Damages found the measure of Galveston Shipbuilding's damages to be its cost of completion less the balance owed to Petitioner. (R.A.-6) Cost of completion was $319,000.00 (monies paid to Maritime Coatings). The balance due Petitioner was $273,943.40 determined as follows: $333,110.00 (Purchase Order price) minus $41,555.00 (value of coatings included but not purchased) minus $32,950.00 (down-payment paid by Galveston Shipbuilding) plus $15,-338.40 (value of coatings actually purchased by Peti-

tioner). Galveston Shipbuilding's judgment was $319,-000.00 minus $273,943.40, which equals $45,056.60, plus costs and interest. (P.A.-2) The Court of Appeals affirmed both the District Court's Findings of Fact, Conclusions of Law and Memorandum Opinion and its Findings of Fact and Conclusions of Law Relating to Damages. (P.A.-1)

ARGUMENT

This Court should deny Petitioner's Petition for Writ of Certiorari. The decisions below turned on the unique facts of this narrow business construction case, and will not affect anyone other than the litigants themselves. The case will not serve as precedent in any court since neither the District Court's nor the Fifth Circuit's opinion was published. Even if the questions were important, the courts below responded to them properly such that no question was decided in a way conflicting with the state courts. U.S. SUP. CT. R. 17.1(a).

First, where the contractor (Petitioner) has partly performed and then defaulted, and the defects and omissions may be remedied without economic waste, the measure of the owner's (Galveston Shipbuilding) recovery is its cost of completion, whether or not contractor's performance is substantial, credited against the balance owed to the contractor. *McKnight v. Renfro,* 371 S.W.2d 740, 745 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.); *Loggins v. Gates,* 301 S.W.2d 525, 527 (Tex. Civ. App. —Waco 1957, writ dism'd); 5 CORBIN ON CONTRACTS § 1089 at 491; RESTATEMENT OF CONTRACTS § 346 (1933). The Petitioner misconstrues the difference in the stated contract prices of Maritime Coatings' purchase

order as a "bonus" and "special damage." Certainly, it was in the contemplation of the parties that if Petitioner did not complete one single task that was of some benefit to Galveston Shipbuilding, someone else would have to be hired to do the job at, more than likely, Petitioner's contract price or higher. *Humble Oil & Refining Co. v. Wood,* 292 S.W. 200 (Tex. Comm'n App. 1927, jdgmt adopted).

The District Court found that Petitioner was given at least ten weeks, from July 30, 1976 to October 9, 1976, to perform its contract with Galveston Shipbuilding. (P.A.-9) The performance essentially included setting up equipment, blasting, priming, coating, and then taking the equipment down. After six weeks had passed, not one square foot of one of the five tanks on the barge was prepared for coating. (P.A.-10) Petitioner was not able, willing, or prepared to finish the job within the four weeks that remained on the contract. (P.A.-17) After the termination of Petitioner's contract on September 9, 1976, Galveston Shipbuilding contracted with Maritime Coatings to perform the same task.

Maritime Coatings' purchase order dated September 10, 1976 refers to the schedule for job performance as follows:

> As time is of the essence; work is to begin Friday, September 10, (with beginning of shipping equipment to Galveston) and all work is to be performed within the twenty-nine (29) days, approximately four (4) weeks ending on October 8, 1976, as quoted by your Mr. Dick Trum. October 9th is the scheduled date for removing coating equipment from the vessel in preparation for launching on October 10th.

Maritime Coatings' contract gave it from September 10th through October 8th, 1976, to ship equipment and manpower to Galveston and finish the job. October 9th was to be used to remove the equipment from the barge. Maritime Coatings finished the job by October 17, 1976. The District Court found that for all practical purposes, Maritime Coatings completed the work within four weeks. (P.A.-17) In approximately four weeks, Maritime Coatings performed the task which Petitioner could not even begin to make progress on in six weeks. The total amount paid to Maritime Coatings of $319,000.00 was the cost of the performance of the job. This payment made under Maritime Coatings' contract was in mitigation of damages since it saved Galveston Shipbuilding, and therefore Petitioner, from a claim by the owners for liquidated damages, or worse, cancellation of the contract. (P.A.-6) Petitioner knew severe consequences could result if the job was not completed on time. (P.A.-9)

The Maritime Coatings' price provision in its contract reads as follows:

> Three Hundred Nineteen Thousand Dollars ($319,-000.00) if job is completed within the specified four (4) week period ending October 8, 1976.
>
> Two Hundred Seventy-Five Thousand Dollars ($275,000.00) if job requires six (6) weeks (to October 22nd).

The job did *not* require until October 22nd to finish. The parties by their conduct resolved the ambiguity of what price was to be paid if the job required a little over four weeks to finish.

Petitioner talks about the "duty" of Galveston Shipbuilding to mitigate damages. While the injured party

should make a reasonable effort to avoid consequences of a breach, he is not required to imperil his cause of action or sacrifice a substantial right, or incur undue risk, expense or humiliation. 11 WIILLISTON, TREATISE ON THE LAW OF CONTRACTS § 1353 at 274 (Jaeger ed. 1961). Galveston Shipbuilding did make a reasonable effort, as previously shown. What is a reasonable effort is a question of fact for the trial court, without jury, to decide. *Id.* at 277.

Petitioner should not be allowed to gain by its own breach. However, that is exactly what it will do if it is allowed to ignore the District Court's finding as to cost of completion.

Secondly, Petitioner left on the job site coatings valued at $15,338.40 which were used by Galveston Shipbuilding. Petitioner's contract price included coating material with a value of $41,555.00. Maritime Coatings' contract price was $319,000.00, which did *not* include the price of coatings since Galveston Shipbuilding was to provide this. It is undisputed that not one ounce of coating was used, but that only primer was used. Only $15,338.40 out of $41,555.00 worth of coatings for the job was even purchased. A logical inference is that Galveston Shipbuilding would have had to purchase at least the same amount of coatings for Maritime Coatings to do the job, as was contemplated by Petitioner originally. To make a fair comparison between contracts at trial, the value of coatings to be purchased was subtracted out of Petitioner's contract so that the true and comparable contract price of $291,555.00 was established.

It is fundamental that in order to complain about a ruling by the District Court, the complaining party must

"make known to the Court the action that he desires the Court to take or his objection to the action of the Court and his grounds therefor." 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2472 at 454 (1971). The objection must state the specific grounds therefor or it is insufficient. *Id.* § 2473 at 462. Also, the complaining party will not be allowed to rely on appeal on grounds other than those stated in the objection. *Id.* § 2473 at 464. In this case, Petitioner did not object to the use by Galveston Shipbuilding of evidence, exhibits, and Petitioner's witnesses' testimony as to the value of coatings or its use in the measure of Galveston Shipbuilding's damages. The issue was not raised in the District Court below. Further, this issue was an implied fact finding by the District Court when it found the balance due Tanklining to be $273,943.40. *Boley v. Griswold,* 87 U.S. 486, 487, 20 Wall. 486, 22 L.Ed. 375 (1874); *Aetna Ins. Co. v. Rhodes,* 170 F.2d 111, 115 (10th Cir. 1948).

CONCLUSION

The Findings of Fact and Conclusions of Law of the District Court, as affirmed by the Court of Appeals, were correct. The determinations of the cost of completion of a job not done and the balance due to Petitioner on an uncompleted contract were correct, logical, and legal. To do otherwise would be to reward Petitioner for its breach of contract. The questions raised are narrow and the answers are never likely to be precedent.

For these reasons, a Writ of Certiorari should *not* be issued to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

Of Counsel:

CHARLES M. JORDAN
DIBRELL, DIBRELL, GREER
& BROWN
One Moody Plaza, 14th Floor
Galveston, Texas 77550
(713) 765-5525

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari have been mailed by certified mail, return receipt requested, to all counsel of record on this _____ day of March, 1981.

_____

CHARLES M. JORDAN

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION No. G-77-164

TANK LINING CORPORATION
Plaintiff

v.

GALVESTON SHIPBUILDING CO.,
BREWER KMI, INC., and
C. BREWER & CO., LTD.
Defendants

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO DAMAGES

On the 1st day of May, 1979, the parties, through counsel, appeared in chambers, and counsel for both parties presented to the court their proposed findings of fact and conclusions of law relating to damages and submitted oral arguments in support of their proposed findings. The court, having duly considered the evidence, the arguments of counsel, and the proposed findings of fact and conclusions of law relating to damages submitted by both parties, finds that the FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO DAMAGES submitted by the plaintiff are substantially correct, except as noted below, and said plaintiff's FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO DAMAGES are adopted as the Court's findings of fact and

conclusions of law relating to damages, with the following exceptions:

1. The court does not and cannot accept the proposition that the plaintiff is entitled to recover the sum of $32,688.28 for shipyard services over and above the contract. The court's reasons for this conclusion are: The measure of damages for breach of contract for failure to complete the work in a timely manner is set forth in the purchase order. No provision is made in the contract for shipyard services over and above the contract. There is considerable dispute between the parties as to whether or not the so-called "shipyard services" were actually called for by the contract, and the court is not persuaded by a preponderance of the evidence that said shipyard services were not provided for by the contract. In the event Tank Lining Corporation had completed the work, it is the court's belief that this claim for shipyard services over and above the contract would have been negotiated, and it is highly unlikely that Galveston Shipbuilding would have been paid for all of said services. In short, the court is not persuaded that the plaintiff has borne its burden of proof with reference to the $32,688.28 in shipyard services over and above the contract, and this element of damage is DENIED.

2. The court cannot accept the proposition that attorneys fees are proper in this matter. The gist of the plaintiff's case is a claim for breach of contract. Under the traditional view of the Texas Attorneys Fees statutes, before its amendment subsequent to

the accrual of this cause of action, the basic rule was that a party suing for breach of contract is not entitled to attorneys fees.

With the exceptions noted, the plaintiffs' FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO DAMAGES are incorporated by reference and adopted as the COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO DAMAGES, and judgment will be entered accordingly.

ENTERED and EXECUTED at Galveston, Texas, this the 2nd day of May, 1979.

/s/ Finis E. Cowan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. G-77-164

TANK LINING CORPORATION
Plaintiff

v.

GALVESTON SHIPBUILDING CO.,
BREWER KMI, INC., and
C. BREWER & CO., LTD.
Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO DAMAGES

The Court adopts, re-affirms, and makes a part of these Findings of Fact and Conclusions of Law its Findings of Fact and Conclusions of Law found, concluded, and adjudged in and by its Memorandum Opinion and Order given and filed herein on April 19, 1979, on the separate issue of breach of contract. The Court, makes the following Findings of Fact, and therefrom, the following Conclusions of Law herein on the issue of damages:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The following facts were stipulated or undisputed in the evidence:

a) The GALVESTON SHIPBUILDING-TANK LINING contract price was $333,110.00;

b) The contract price included TANK LINING furnishing the coating materials with value of $41,-555.00;

c) TANK LINING was paid $32,950.00 by GALVESTON SHIPBUILDING as a down payment;

d) GALVESTON SHIPBUILDING used $15,-338.40 worth of coatings left on the job site by TANK LINING to complete the job;

e) The contract price paid to MARITIME COATINGS, INC., to complete the work was $319,000.00, not including any coating materials;

f) The predicate to the introduction of attorney's fees under Article 2226 of the Texas Revised Civil Statutes Annotated was made;

g) The amounts of reasonable attorney's fees submitted into evidence by the attorney for GALVESTON SHIPBUILDING, and to be awarded to GALVESTON SHIPBUILDING, in addition to all other recoveries are as follows:

1) $15,000.00 for preparation and trial of this cause;

2) $10,000.00 for an appeal to the United States Court of Appeals for the Fifth Circuit;

3) $7,500.00 for responding to an Application for Writ of Certiorari to the Supreme Court of the United States; and,

4) $7,500.00 for an appeal to the Supreme Court of the United States, in the event the Application for Writ of Certiorari is granted.

h) The balance due to TANK LINING on the contract is $258,605.00. This sum is the contract price, $333,110.00, minus the down payment, $32,950.00 minus the coatings not used, $41,555.00.

2. By a preponderance of the credible evidence, it was shown that the shipyard services outlined in GALVESTON SHIPBUILDING's invoice dated August 11, 1976 sent to TANK LINING, were over and above the contract services that were to be provided by GALVESTON SHIPBUILDING and paid for by TANK LINING regardless of whether or not the contract was completed. Therefore, TANK LINING owes to GALVESTON SHIPBUILDING, the amount of the invoice, $32,688.28, which charges were reasonable and customary.

3. The basic premise for recovery by GALVESTON SHIPBUILDING is that TANK LINING's default, the measure of GALVESTON SHIPBUILDING is recovery of its cost of completion less the balance owed to TANK LINING.

4. Under Tex. Rev. Civ. Stat. Ann. art. 5069-1.03 (1971), pre-judgment interest at 6% per annum shall run from January 1, 1977 through the date of judgment.

5. The below mathematical calculations show the damages which GALVESTON SHIPBUILDING suffered as a direct and proximate result of TANK LINING's breach of contract and which shall be awarded:

Galveston Shipbuilding's cost of completion		$ 319,000.00
Plus: Galveston Shipbuilding's Shipyard services over and above contract		$ 32,688.28
Less: Balance owed on contract to Tank Lining		$(258,605.00)
: Coatings left on job site by Tank Lining		$(15,338.40)
		$ 77,744.88
Plus: Galveston Shipbuilding's attorney's fees for trial and appeal		$ 40,000.00
		$ 117,744.88

Plus: Pre-judgment interest at 6% through date of Judgment

: Post-judgment interest at 9% from date of Judgment until paid

6. Alternatively, GALVESTON SHIPBUILDING is entitled to the sum of money paid to MARITIME COATINGS over and above the price it was to pay to TANK LINING for the same job. Further, the downpayment paid by GALVESTON SHIPBUILDING shall be returned to it. In addition, TANK LINING shall pay for the shipyard services rendered over and above the original contract.

7. The alternative and additional theory to support GALVESTON SHIPBUILDING's recovery from TANK LINING is mathematically shown as follows:

Maritime Coatings' Contract Price		$ 319,000.00
Less: Tank Lining's Contract Price (333,110.00 - 41,555.00)		(291,555.00)
: Coatings left on job site		(15,338.40)
Plus: Downpayment		32,950.00
: Shipyard services over and above contract		32,688.28
		$ 77,744.88
Plus: Attorney's fees		40,000.00
		$ 117,744.88

Plus: Prejudgment interest at 6%
Post-judgment interest at 9%

8. That the law herein is with the GALVESTON SHIPBUILDING and against TANK LINING; and that GALVESTON SHIPBUILDING is entitled to have and recover herein, of and from TANK LINING, and judgment ought to be given and entered herein for GALVESTON SHIPBUILDING and against TANK LINING for damages in the sum of $117,744.88, with remititure on attorney's fees for appellate steps not taken, and interest as allowed by law, and GALVESTON SHIPBUILDING's costs herein to the extent permitted by law.

ENTERED and EXECUTED this the_____ day of _____, 1979.

FINIS E. COWAN
United States District Judge

ER L.
CLERK

NO. 80-1476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TANKLINING CORPORATION
Petitioner,

v.

GALVESTON SHIPBUILDING CO.,
BREWER KMI, INC., AND
C. BREWER & CO., LTD.
Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

Of Counsel:

ROBERT C. FLOYD
BUTLER, BINION, RICE,
COOK & KNAPP
1100 Esperson Building
Houston, Texas 77002
(713) 237-3273

Attorneys for Petitioner

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

The Petitioner, Tanklining Corporation, respectfully requests permission to reply to the Respondent's Brief in Opposition as follows:

On page seven of Respondent's Brief in Opposition, it is stated:

> "A logical inference is that Galveston Shipbuilding *would have had to purchase at least the same amount of coatings* for Maritime Coating to do the job, as was contemplated by Petitioner originally. To make a fair comparison between contracts at trial, the value of coatings *to be purchased* was subtracted out of Petitioner's contract so that the true and comparable contract price of $291,555.00 was established."

This type of inference or speculation is exactly what is prohibited under Texas law.

Respondent, again, has basically admitted there was no evidence of actual expenditures for purchase of additional coating materials to complete the contract. Texas law required Respondent[1] to prove how much money was actually expended to complete the contract. *Nelson v. San Antonio Traction Co.*, 107 Tex. 180, 175 S.W. 434 (1915); also, *Hillyard v. Crabtree*, 11 Tex. 264 (Tex. Sup. Ct. 1854); *Gonzales College v. McHugh*, 21 Tex. 257 (Tex. Sup. Ct. 1858); *McKnight v. Renfro*, 371 S.W. 2nd 740 (Tex. Civ. App.—Dallas, 1963, writ ref'd n.r.e.).

The amount of expenses actually incurred, if any, to complete the contract were easily ascertainable and determinable to the penny. Respondent needed only to demonstrate the expenditures by means of invoices or payments made by its employees. The amount of expenditures cannot be determined by speculation or guess, but must be based on evidence from which the amount can

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1. In the Petition for Writ of Certiorari, page 8, Petitioner erroneously referred to "Petitioner" having the burden of proof of how much money was actually expended. The burden of proof was upon the Respondent in this matter.

be ascertained. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 LE 684 (1927); also, *Hetzel v. Baltimore and Ohio Railroad Co.*, 169 U.S. 26, 18 S.Ct. 255, 42 LE 643 (1898).

Respondent has brought suit against Maritime Coatings for failing to perform work on the barge in question in a good and workmanlike manner. Perhaps Maritime's failure to actually purchase the additional coating materials to complete the contract is the reason its work failed. Again, this is an example of the type of speculation which is not entitled to probative value in determining ultimate issues under Texas law or the majority of jurisdictions.

For the reasons stated above, as well as those stated in the Petition for Certiorari; Petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,

Of Counsel:

/s/

ROBERT C. FLOYD
BUTLER, BINION, RICE,
COOK & KNAPP
1100 Esperson Building
Houston, Texas 77002
(713) 237-3273

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Reply to Brief in Opposition have been mailed by certified mail, return receipt requested, to all counsel of record on this 15th day of April, 1981.

/s/
ROBERT C. FLOYD